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2005 MAY 27 PM 1:22

TR. N. Docket Room

May 27, 2005

Honorable Pat Miller, Chairman  
Tennessee Regulatory Authority  
ATTN: Sharla Dillon, Dockets  
460 James Robertson Parkway  
Nashville, TN 37243-5015

**Via Hand Delivery**

Re: Petition of Citizens Telecommunications Company of Tennessee, LLC d/b/a  
Frontier Communications of Tennessee; Docket No 03-00211

Dear Sharla

Enclosed for filing in the above-referenced matter, please find the original and 13 copies of the Reply Brief of Ben Lomand Communications, Inc. Thank you for your assistance

Sincerely,



H. LaDon Baltimore

LDB/dcg  
Enclosures  
cc: Guilford Thornton, Esq.

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE

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IN RE: )  
)  
CITIZENS TELECOMMUNICATIONS )  
COMPANY OF TENNESSEE, LLC, ) DOCKET NO. 03-00211  
d/b/a FRONTIER COMMUNICATIONS )  
OF TENNESSEE, )  
)  
Petitioner. )

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**REPLY BRIEF OF BEN LOMAND COMMUNICATIONS, INC. TO THE  
INITIAL BRIEF OF CITIZENS TELECOMMUNICATIONS COMPANY  
OF TENNESSEE D/B/A FRONTIER COMMUNICATIONS OF TENNESSEE**

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Ben Lomand Communications, Inc. ("Ben Lomand"), by and through its undersigned counsel, respectfully files this reply to the initial brief of Citizens Telecommunications Company of Tennessee d/b/a Frontier Communications of Tennessee ("Frontier" or "Citizens") filed in this matter on May 6, 2005.

**I. ARGUMENT**

**A. Citizens has failed to prove that release from the price floor is in the public interest.**

The requirement from relief from the price floor is that such relief be in the public interest. Tenn. Code Ann. §65-5-108(c). Citizens has the burden of proof in this matter and it has failed to meet that burden. Citizens argues that relief from the price floor is good for Citizens, but does not make a case that it is in the public interest.

Citizens argues that it cannot compete against Ben Lomand because it is bound by the price floor. The fact that Citizens has lost business to Ben Lomand is not a ground for the Tennessee Regulatory Authority ("TRA" or "Authority") to grant it exemption from the price

floor. The requirement for exemption from the price floor is that it is "in the public interest," not because a competitor loses business.

Citizens ignores any other reason for the loss of customers other than the fact that it operates under the price floor requirement. Citizens completely ignores the fact that Ben Lomand is beating Citizens in the marketplace with service, product offerings, and occasionally, price. Ben Lomand's prices are sometimes equal to, sometimes below, and sometimes above those of Citizens. (See Rebuttal Testimony of LeVoy Knowles, page 7).

**B. The fact that Citizens no longer enjoys any competitive advantage by virtue of its ILEC status is not relevant.**

As stated *supra*, the fact that Citizens is losing market share is not a reason for the TRA to grant it exemption from the price floor. Citizens has already reduced its price from 42% to 74% (See Rebuttal Testimony of LeVoy Knowles, p 5) Even with that, Citizens admits that it now has only 36% of the business in McMinnville and Sparta that it had in 1999. (See Initial Brief of Citizens, page 5).

**C. The fact that Citizens must file a cost study with the TRA is not grounds for exemption from the price floor.**

Once again, Citizens urges the TRA to exempt it from the price floor because it has to prepare "expensive and time consuming cost studies, which not only expend the resources of Frontier but also delay its ability to meet challenges in the market." (See Initial Brief of Citizens, page 5).

Citizens makes the argument that Ben Lomand will take advantage of the "umbrella" pricing because it could price its services below Citizens's. (See Initial Brief of Citizens, pages 5-6). This argument ignores the fact that Ben Lomand cannot go as low as prices with Frontier

because Ben Lomand does not have the vast resources of a multi-state organization such as Citizens.

**D. Allowing Citizens to price below the price floor opens the door to anti-competitive practices.**

Citizens states that it will not engage in unlawful predatory conduct, but no guarantees are set forth. Frontier does not offer any proposals to the TRA to safeguard against such conduct. At present, there are no TRA rules and regulations which define the responsibilities of a CLEC which is exempted from the price floor requirement, since no CLEC has been exempted from the statutory price floor requirements.

As stated in the rebuttal testimony of LeVoy Knowles at pages 3 - 5, it is apparent that if Citizens prices its services below cost, someone has to subsidize the operation. The testimony of J. Michael Swatts states that Citizens will make up the shortfall by selling more vertical services above cost. (See Testimony of J. Michael Swatts, page 11) However, as stated in Mr. Knowles's testimony, at page 4 with exhibit, Citizens is also discounting other features as well as the local rates. If not only local rates are priced below the price floor and vertical services are also being discounted, it would lead to the conclusion that the shortfall would have to be made up from other Tennessee consumers.

Citizens states that Ben Lomand has not met the evidentiary burden to prove that predatory pricing will occur. However, in this matter it is Citizens who is the petitioner and it is the one which has the burden of proof on all issues. Ben Lomand has submitted arguments and testimony for the TRA to consider on this issue.

Citizens argues that even if it "were to somehow force BLC out of the market with artificially low prices, BLC could easily reenter the market as soon as Frontier tried to raise prices." (See Initial Brief of Citizens, page 8). This argument ignores the fact that this could not be easily done. Ben Lomand could not leave a market and just jump back in at any time. Even if that were possible, Citizens could always lower prices again and the cycle would repeat itself.

**E. Citizens's relationship with its parent company and/or affiliates is relevant to this matter.**

In its initial brief, Citizens argues that its relationship with any parent company or affiliate is irrelevant. To bolster such argument, Citizens quotes *BellSouth BSE*, 2003 WL 354466 at \*17. However, this case is not relevant to the matter at hand. In that case, the issue was whether the TRA was correct when it denied BellSouth the right to establish a CLEC. The court stated that the mere fact that there was an affiliation between BellSouth ILEC and BellSouth CLEC was not grounds for denial of a certificate of authority to an affiliate as a CLEC.

The issue in this matter is distinct: the issue is exemption from the price floor requirement of Tenn. Code Ann. §65-5-108(c). In *BellSouth BSE*, affiliation alone was the consideration. Here, it is affiliation **AND** pricing below cost. In *BellSouth BSE*, denial was based on affiliation; here, affiliation is just one factor and then it is in combination with below cost pricing. Here, the issue is an ILEC that is pricing below cost and the danger of predatory pricing. The mere fact that it is an affiliation does not mean that it would engage in predatory pricing, but the combination of below cost pricing and affiliation raises the issue of predatory pricing. This is a combination that is a danger to the public interest.

Repeatedly, Citizens argues that it "intends to recover some of the revenues lost by below cost pricing by offsetting such losses against receipts from services priced above cost, such as DSL, Internet, voice mail, long distance." (See Initial Brief of Citizens, page 8; Testimony of J Michael Swatts, page 11). It is certainly NOT in the public interest to lure customers to sign up with low basic service and then gouge the customer with high prices on other services.

**F. There are no rules, regulations, policies, or guidelines for a company to operate under when it is relieved from the price floor requirement.**

Citizens "agrees to continue to file tariffs and other materials as required by law in support of such rate changes." (See Testimony of J. Michael Swatts, page 9, Initial Brief of Citizens, page 3). While Citizens states that it would agree to continue to file tariffs and other materials, it does not agree to any other requirements of the TRA, nor does Citizens state how long it would continue to file tariffs and other materials. Citizens ignores the fact that there has been no rulemaking proceeding to establish rules and regulations for a CLEC which has been exempted from the price floor requirement. A rulemaking proceeding on the issue of exempting a CLEC from a price floor requirement is necessary before such an exemption can be granted to a specific company, including Citizens.

## **II. CONCLUSION**

For the foregoing reasons, the Authority should deny Citizens's petition in its entirety

Respectfully submitted,



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**Certificate of Service**

The undersigned hereby certifies that on this the 27<sup>th</sup> day of May, 2005, a true and correct copy of the foregoing has been forwarded via first class U. S. Mail, hand delivery, overnight delivery, electronic transmission, or facsimile transmission to the following

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